LAM ENG RUBBER FACTORY (M) SDN. BHD.

v.

LIM BENG YEW & 4 ORS.

HIGH COURT MALAYA, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 545-84]
27 AUGUST 1994

CONTRACT: Claim by plaintiff/company for return of monies purportedly advanced to defendants/shareholders - Evidence of advance contained in resolution - Allegation that resolution a binding contract between the parties - Whether resolution can be considered a contract - Oral evidence contradicting resolution -Whether oral evidence barred by ss.91 or 92 of the Evidence Act 1950 - Reliance on accounts and minutes of meetings to prove advance made - Whether proven - Plaintiff raising estoppel - Whether pleaded - O. 18 r. 8(1) RHC - Whether can be relied on.

EVIDENCE: Plaintiff claiming return of monies purportedly advanced to defendants - Evidence of advance in company resolution - Oral evidence adduced contradicting written resolution - Whether oral evidence admissible - Sections 91 & 92 Evidence Act 1950.

PRACTICE & PROCEDURE: Claim for return of monies purportedly advanced to defendants by plaintiff - Contradiction between documentary and oral evidence - Whether plaintiff able to prove - Estoppel raised - Whether pleaded by plaintiff - Whether can be relied upon - Necessity to plead all material facts - O. 18 rr. 7 & 8(1) RHC.

The plaintiff company's claim was for monies purportedly advanced to the defendants by the plaintiff which the defendants denied. The plaintiff adduced evidence in the form of a resolution which stated that the plaintiff company "do...make an advance without interest" to 11 persons in various sums amounting to RM360,000. This evidence was contradicted by the oral evidence of the plaintiff's director, PW1, who stated that the plaintiff did not have RM360,000 standing to its credit at the date of the resolution and that the plaintiff had not advanced any monies to any of the 11 shareholders which evidence supported the defence. Plaintiff's Counsel submitted that oral evidence could not be admitted to contradict the resolution, which he claimed was a contract, by virtue of s. 91 of the Evidence Act 1950. The plaintiff placed reliance on *inter alia* audited reports and accounts and minutes of meetings to show that monies had been advanced to the defendants and also raised the issue of estoppel.

Held:

[1] The Court failed to see how the resolution could be considered as a contract between the plaintiff and its shareholders. Nowhere in the resolution was it shown that there was an offer to lend money by the plaintiff and that the offer had been accepted by the defendants nor was there shown that "at the request of the defendants the plaintiff advanced and the defendants borrowed..." certain sums of money as averred in paragraph 5 of the statement of claim. The Court also failed to see how either ss. 91 or 92 of the Evidence Act 1950 could be invoked.

[2] In light of the admission of PW1 and the evidence adduced on behalf of the defendants that the plaintiff did not have RM360,000 at the date of the resolution and

did not make any advances for that sum, the plaintiff's reliance on other documentary evidence to show that the sums were advanced came to nought.

[3] The plea of estoppel was never raised in the plaintiff's pleadings. Under O. 18 r. 8(1) of the Rules of the High Court 1980 (RHC) estoppel must be specifically pleaded unless there is no opportunity to do so. The plaintiff should have raised a reply to the averments in the defence which *inter alia* claimed that the defendants did not borrow any money from the plaintiff. The opportunity was there for the plaintiff to plead estoppel and it did not do so. It could not now rely on estoppel. Even assuming that the plaintiff had pleaded estoppel, the Court could not see how estoppel could be raised when the truth - that the plaintiff did not have RM360,000 and could not and did not lend nor disburse any amount at all to the shareholders - was within the knowledge of the plaintiff as it was within the knowledge of the shareholders.

[4] PW1 confirmed that not a sen of the RM360,000 was taken out of the plaintiff's account and paid to any of the shareholders which evidence accords with the defendants' evidence and conclusively negates the averment in paragraph 5 of the statement of claim. On these facts which were not pleaded at all and which were clearly and materially different from the facts averred in paragraph 5 of the statement of claim, the plaintiff's claim should be dismissed.

[Plaintiff's claim dismissed with costs].

Cases referred to:
Sarat Chunder Dey v. Gopal Chunder Lala [1892] LR 19 Ind App 203 ***(cit)***
Amalgamated Investment & Property Co. Ltd. v. Texco Commerce International Bank Ltd. [1981] 1 All ER 923/[1981] 3 All ER 577 ***(cit)***
Copinger v. Norton [1902] 2 Ir R 241 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92, 115
Rules of the High Court 1980, O. 18 rr. 7, 8(1)
Evidence Act, s. 115 (India)

Other sources referred to:
Sarkar on Evidence, 13th Edn., p. 115
Supreme Court Practice, 1991, pp. 281, 287

For the plaintiff - Tan Kah Hoo; M/s. Gan Teik Chee & Ho
For the defendants - Choe Kuan Hooi (Hamzah Muhamad with him); M/s. Choe Shakri & Hamzah

JUDGMENT

K.C. Vohrah J:
Two families (for convenience called "the Yeoh family" and "the Lim family") jointly purchased the plaintiff company in December 1978. It is not disputed each family purchased 50% of the 10,000 shares in the plaintiff company.

The "Yeoh family" comprises Yeoh Soo Lim and 4 others. Yeoh is presently a director of the plaintiff company and he gave evidence on behalf of the plaintiff company as PW1.

The "Lim family" comprises Lim Beng Yew the 1st defendant (the father-in-law of PW1) and the other 4 defendants.

Claim for moneys advanced

The plaintiff company's claim is for sums of money which it avers were advanced to the defendants by the plaintiff company and which remain severally unpaid or partly paid.

In paragraph 5 of the amended statement of claim the plaintiff company avers that "(on) or about 28 December 1978, at the request of the defendants the plaintiff advanced and the defendants borrowed from the plaintiff without any interest whatsoever the undermentioned sums of money:

(a) 1st Defendant	RM82,000.00
(b) 2nd Defendant	RM36,000.00
(c) 3rd Defendant	RM36,000.00
(d) 4th Defendant	RM14,400.00
(e) 5th Defendant	RM10,800.00

The defendants in para 6 of their amended defence deny having borrowed any money from the plaintiff company.

Nature of Evidence

The plaintiff company adduced evidence of a resolution dated 28 December 1978 which showed that it was signed by PW1, DW1 (the 1st defendant) and DW3 (the 2nd defendant) and that it resolved that the plaintiff company "do ... make an advance without interest" to 11 persons in various sums amounting to RM360,000. Counsel for the plaintiff company argued that P1 is a document "where the terms of the contract have been reduced by the consent of the parties to a form of a document". There was, however, oral evidence by PW1 himself that the plaintiff company did not have RM360,000 standing to its credit on 28 December 1978 and that it did not advance any sum of money at all to any of the 11 shareholders. This coincided with the defence and the evidence adduced on behalf of the defendants. To counter the effect of this evidence, Counsel for the plaintiff argued that no oral evidence may be admitted to contradict the terms of a contract which have been reduced into writing, it being barred by s. 91 of the Evidence Act. He also relied on other documentary evidence, *inter alia*, audited reports and accounts of the plaintiff company from 1977 to 1983 and the minutes of the Directors' Meetings and the Annual General Meetings which appeared to show that sums of money had been advanced to the shareholders by the plaintiff company and that the shareholders including the defendants owed the plaintiff company the sums reflected in the accounts of the company. Counsel also argued, relying on estoppel, that P1 and the other documents showed that a representation had been made by the defendants to the plaintiff company that they owed the plaintiff company the sums reflected in the accounts of the company, and "it would be unconscionable for the defendants to deny it subsequently".

Documentary Evidence

To appreciate the nature of the resolution it is necessary to see what it says:

Lam Eng Rubber Factory (M) Sdn. Berhad

Resolution signed by the Directors of Lam Eng Rubber Factory (M) Sdn. Berhad and dated 28 December 1978.

Advanced to to Directors and Shareholders

Resolved that the company do hereby make an advance without interest to the following Directors and Shareholders

Name	Amount RM
Lim Beng Yew	82,800.00
Yeoh Soon Lim	36,000.00
Lim Siak Kuang	36,000.00
Ng Ah Looi	36,000.00
Yeoh Sin Hong	36,000.00
Yeoh Seng Joo	36,000.00
Yeoh Seng Hock	36,000.00
Lim Mui Keau	18,000.00
Lyem Seea Ang @ Lim Pu Ti	14,000.00
Lim Siah Heng @ Lim Seek Sin	10,000.00
	360,000.00

Sgd
Lim Beng Yew

Sgd.
Yeoh Soon Lim

Sgd.
Lim Siak Kuang

Counsel for the plaintiff company submitted that the resolution, P1, is a document within the meaning of s. 91 of the Evidence Act 1950 as it is a document where the terms of "the contract" had been reduced "by the consent of the parties" to a form of a document and therefore no extrinsic evidence shall be admitted for the purpose of contradicting its terms.

I fail to see how the resolution can be considered as a contract between the plaintiff company and its new shareholders. That the document shows that it is a resolution signed by 3 directors stating that the company "do hereby make an advance" to the directors and shareholders does not indicate that it is a contract. Nowhere in P1 is it shown that there was an offer to lend money by the plaintiff company and that the offer was accepted by the defendants. More specifically, there is nothing in the resolution which shows that "at the request of the defendants the plaintiff advanced and the defendants borrowed ..." certain sums of money as averred in paragraph 5 of the statement of claim. I fail to see how either s. 91 or s. 92 of the Evidence Act can be invoked.

What Counsel for the plaintiff company had sought to do was to show that with P1 as evidence, that on 28 December 1978 the plaintiff company must have had a sum of

RM360,000 standing to its credit and that various amounts of this sum were advanced to the shareholders which included the defendants. P1, however, does not show that the plaintiff company had RM360,000 or any money to make such advances or that any moneys were indeed disbursed. The evidence of PW1 on behalf of the company, and the evidence adduced on behalf of the defendants as pointed out earlier, and which will be discussed later, indicate very clearly that indeed the plaintiff company did not have the said sum of RM360,000 and that indeed no money at all was advanced to the shareholders.

As for the other documents - the audited reports and accounts of the company and the minutes of the Directors' Meetings and Annual General Meetings - my view is that since the plaintiff company cannot rely on P1 to show that there was a contract as alleged in paragraph 5 of the statement of claim, therefore, in the light of the admission of PW1 and the evidence adduced on behalf of the defendants that the plaintiff company had no sum of RM360,000 on 28 December 1978 and did not make any advance for that sum, the reliance of the plaintiff on other documentary evidence to show that sums of money were advanced comes to nought.

Estoppel

As was pointed out earlier, Counsel for the plaintiff company had submitted that from the documentary evidence - the resolution, P1, the audited reports and accounts of the plaintiff company for the years 1977 to 1983, the minutes of the Directors' Meetings and the Annual General Meetings - it was clear that a representation had been made by the defendants "that they owed the plaintiff the sums reflected in the accounts of the company" and that "it would be unconscionable for the defendants to deny it subsequently". The further argument was that the plaintiff company and the defendants had proceeded on the common basis that there was a legally binding agreement of advances evidenced by the resolution, P1, and therefore the defendants are estopped by convention from contending that there was no existing agreement between the plaintiff company and the defendants. He also submitted that an estoppel is capable of creating a legal binding contract where none existed before, citing the Privy Council decision in *Sarat Chunder Dey v. Gopal Chunder Lala* [1892] LR 19 Ind App 203 dealing with s. 115 of the Evidence Act of India (which is in *pari materia* with s. 115 of our Act). Finally he argued that the assumed contract created by the estoppel is capable of giving rise to a cause of action to enforce a gratuitous promise, relying on a host of cases including *Amalgamated Investment & Property Co. Ltd. v. Texco Commerce International Bank Ltd*. decided in the High Court [1981] 1 All ER 923 and decided in the Court of Appeal [1981] 3 All ER 577.

It has to be noted that the plea of estoppel was never raised in the plaintiff's pleadings. What is clear is that under O. 18 r. 8(1) estoppel must be specifically pleaded unless there is no opportunity to do so (see **Supreme Court Practice,** 1991, 287 where the case of *Copinger v. Norton* [1902] 2 Ir R 241 is cited in respect of the equivalent English rule). The plaintiff company should have raised a reply to the defence which in paragraph 6 clearly averred that the defendants did not borrow any money from the Company and that "there was no money or very little money in the bank account of Lam Eng Rubber Factory (M) Sdn. Bhd. when it was bought over in December 1978".

In addition there was this further averment in paragraph 6 of the amended defence which made reference to the resolution P1, that "despite the order for better particulars by the Court, the plaintiff failed to reply to the question but gave vague answers of a

unilateral resolution which was not produced for inspection" and stated that the resolution was only produced after numerous requests. In the face of such specific averments in the defence the plaintiff company should have realised that if it had to rely on P1 and estoppel that (if indeed if it was so) there was an arrangement between the plaintiff company and the shareholders, about the notional borrowing of sums of money by the shareholders from the plaintiff company and that the shareholders made representations to the plaintiff company about the state of their respective debts in relation to the notional borrowing, then the plaintiff company should have raised the plea of estoppel in the pleadings. The opportunity was all the while there for the plaintiff company to plead estoppel and it did not do so. It cannot now rely on estoppel.

Even assuming that the plaintiff had properly raised estoppel in its pleadings, I fail to see how it can be said that it would be unconscionable for the defendants to deny they owed money to the plaintiff company when the evidence shows that the plaintiff company and all the shareholders of the company knew that no money at all was advanced to the shareholders. In other words I do not see how the plaintiff company can rely on estoppel in this case when the truth of the matter - that the plaintiff company did not have RM360,000 and could not and did not lend nor disburse any amount at all to all the shareholders - was within the knowledge of the plaintiff company as it was within the knowledge of all the shareholders. As is observed in **Sarkar on Evidence** 13th Edn., p 115:

> On the part of the person claiming the benefit of estoppel there must be mistake or ignorance as to the real state of things. He must show that he was ignorant of the truth regarding the representation. When both parties are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel [*Honappa v. Narsappa,* 23 B 406, 409; followed in *Ranchodial v. Secy of S,* 35 B 182, 188; *Jacks & Co v. Joosab,* 48 B 38: 82 IC 791; *Jagdip v. Rafokuar,* 2 P 585: 14 PLT 531. See *Oodey Koomer v. Ladoo,* 13 MIA 585, 598; *Narayan v. Raoli,* 28 B 393, 397: 6 Bom LR 417; *Kamal v. Thake,* 15 CWN 152n; *Swaminaddha v. S,* Al927 M 458: 99 IC 772; *Bansidhar v Hazari,* Al933 P 210 ; *Lachman v. Collr,* A1933 A 641; *Rajib v. Bindeshwari,* 15 PLT 596; *Mohini v. Radha,* 39 CWN 1014; *Lorind v. Punjab N Bank,* A1940 L 254; *Kanik v. Medni,* A1942 P 317; *Shiv v. Kidar,* A1972 HP 20].

Oral evidence and the need to plead all material facts

PW1, giving evidence under cross-examination, testified that the 10,000 shares in the plaintiff company were purchased by the two families for RM325,000. His evidence under examination-in-chief, however, was that the plaintiff company in the resolution, P1, dated 28 December 1978 the date on which the shares in the plaintiff company were purchased, resolved to make advances (amounting to RM360,000) to the persons named in the resolution and that the resolution was acted upon by the plaintiff company. Quite clearly what PW1 intended the Court to believe was that the plaintiff company had RM360,000 standing to its credit and that various amounts from that sum of money were actually advanced to the persons named in the resolution. But this was misleading as his further evidence under cross-examination revealed.

When PW1 was first cross-examined he claimed that the sum of RM360,00 was standing as a credit balance of the plaintiff company and that this sum was purchased by the two families. He also said that the two families then borrowed this sum of money from the company. When the plaintiff was recalled for further cross-examination on a subsequent day he confirmed, and it became clear, that there was no such sum of RM360,000 standing to the credit of the company at any bank on the day of purchase. He said that

there had been such a sum before the purchase of the shares in the plaintiff company by the two families but the previous shareholders had withdrawn this sum. PW1 also confirmed that not a sen of this sum of RM360,000 was taken out of the company's account and paid to any of the new shareholders and this piece of evidence accords with the evidence of the defendants and conclusively negates the averment in paragraph 5 of the statement of claim that the "plaintiff advanced and the defendants borrowed from the plaintiff the sums of money" specified in that paragraph. On this show of facts which were not pleaded at all and which are clearly and materially different from the facts averred in paragraph 5 of the statement of claim, the claim of the plaintiff should be dismissed. As was pointed out in **Supreme Court Practice 1991** at p 281 relating to O 18 r 7 (in *pari materia* with O. 18 r. 7 Rules of the High Court) as regards the need to plead all material facts:

> Where the evidence at the trial establishes facts different from those pleaded by the plaintiff constituting negligence which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case pleaded, the action will be dismissed (*Waghorn v George Wimpey & Co. Ltd.* [1969] 1 WLR 1764; [1970] 1 All ER 474).

It was further pointed out:

> Moreover, if the plaintiff succeeds on findings of facts not pleaded by him, the judgment will not be allowed to stand and the Court of Appeal will either dismiss the action (*Pawding v. London Brick Co.* [1971] 4 KIR 207) or in a proper case will if necessary order a new trial (*Llyod v. West Midland Gas Board* [1971] 1 WLR 749; [1971] All ER 1240 (A).

In all the circumstances of this case, the claim should be and is dismissed with costs.